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INDEX.

	PAGE
Statement of the Case	1
Preliminary Suggestions as to the Form of the Certificate	3
Argument	3
Suggestions as to Question I	5
Authorities	6
Argument	7
Suggestions as to Question II	13
Suggestions as to Question III	14
Argument	14
The Appellants' Authorities	16
Conclusion	19

AUTHORITIES.

Cincinnati etc. Railroad v. McKeen, 149 U. S., 259	3
McHenry v. Alford, 168 U. S., 651, 658, et seq.	3
O'Neill v. Central Leather Co., 94 Atl. Rep., 789	5
Rose v. Himely, 4 Cranch., 241	5
Sabariego v. Maverick, 124 U. S., 261	5
Stratton's Independence v. Howbert, 231 U. S., 399, 422	3
The Santissima Trinidad, 7 Wheaton, 284	5
United States v. Union Pacific Railway, 168 U. S., 505, 512	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 119.

EDUARDO RICAUD, L. C. BARLOW and CHARLES HICKERSON,

Appellants,

vs.

THE AMERICAN METAL COMPANY, LIMITED, *et al.*,

Appellees.

BRIEF OF APPELLEE.

Statement of the Case.

The Circuit Court of Appeals for the Fifth Circuit has certified to this Court, pursuant to Section 239 of the Judicial Code, three questions of law arising upon an appeal to it from a judgment of the District Court in favor of the plaintiff, after a trial by the Court.

The questions are as follows:

> I. Assuming that the bullion in suit was seized, condemned and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority from General Carranza, claiming to be the Provisional President of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation and sale by the Carranza forces as against an American citizen claiming ownership of the said bullion prior to its seizure?
>
> II. If yes, does the subsequent recognition by the United States Government of Carranza as the legitimate president of the Republic of Mexico, and his government as the only legitimate government of the Republic of Mexico, deprive this Court of jurisdiction on this appeal to decide and adjudge the case on its merits?
>
> III. If question II is answered in the negative, did the seizure, condemnation and sale of the bullion in the manner and for the purposes stated to be assumed in question I, have the effect of divesting the title to or ownership of it of a certain citizen of the United States of America not in or a resident of Mexico when such seizure and condemnation occurred?

The certificate prefaces the questions with a summary of the allegations contained in the pleadings of the respective parties, adding that

> "On the hearing in the Trial Court there was evidence tending to establish the facts as claimed by each party."

The certificate, after stating the questions in the language above set forth, concludes with the further statement that

> "For information as to the facts and questions in the case copies of transcript and briefs are herewith presented."

We submit the following propositions for the consideration of the Court:

Preliminary Suggestions as to the Form of the Certificate.

The certificate is not sufficient to enable this Court to answer any of the three questions in that, as we shall hereafter show in detail, the certificate does not set forth sufficient facts. The defect is not cured by the reference to the transcript.

Stratton's Independence v. *Howbert,* 231 U. S., 399, 422.
United States v. *Union Pacific Railway,* 168 U. S., 505, 512.
McHenry v. *Alford,* 168 U. S., 651, 658, *et seq.*
Cincinnati etc. Railroad v. *McKeen,* 149 U. S., 259.

Argument.

In the last-named case, this Court, through Mr. Chief Justice Fuller, said:

> "After stating the questions, the certificate concluded with a direction to the clerk to submit to the Clerk of the Supreme Court of the United States, in connection with the

> certificate, twenty copies of the printed record in the cause, and it is apparent that reference to that record is necessary in order to the correct determination of the questions. * * * We are of opinion * * * that this certificate does not comply with Rule 37 of this court, inasmuch as it does not contain proper statement of the facts on which the questions or propositions of law arise. While we have the power to require the whole record and cause to be sent up to us for consideration and decision, the sixth section of the Judiciary Law of March 3, 1891, does not contemplate that questions or propositions of law shall be propounded and the entire record thereupon transmitted for us to answer such questions or propositions in view thereof. It is for us, when questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, to determine whether we will answer them as propounded or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal."

In the case at bar, the only facts presented to this Court by the certificate as a basis for its determination are the facts expressly assumed in each of the questions. That those facts are insufficient to enable the Court to answer the questions we shall show in detail hereafter. We merely wish to point out now that there are no other facts set forth in the certificate on which this Court could base its determination. The recitals of the certificate preceding the questions are merely a summary of the *pleadings* of the respective parties. True, the certificate then states that "there was evidence tending to establish the facts as claimed by each party." But it does not state which of the facts thus plead-

ed are actually to be deemed established or, if they are all to be deemed established, which of them are to be selected as a basis for the determination of this Court. The only guides furnished to this Court are the facts expressly assumed in each of the questions. Those statements, however, as we shall hereafter show, are quite insufficient for the purposes of this proceeding, and under the authorities above cited the defect is not cured by the general reference to the transcript.

Suggestions as to Question I.

1. The jurisdictional point involved in this question is that, generally speaking, our Courts will not adjudicate upon an act of a foreign government. The rule, however, is not entirely unqualified. The Courts will always inquire into the question whether the governmental agency which performed the act in question had general power to do the act and whether the situation was one that justified the exercise of that jurisdiction. Again, they will inquire whether the act was done in compliance with our views as to a fair and just procedure, and will deny the validity of the act where such is not the case. They will do this particularly in cases involving the title to property within their territorial jurisdiction, as is the case here.

Rose v. *Himely,* 4 Cranch., 241.
Sabariego v. *Maverick,* 124 U. S., 261.
The Santissima Trinidad, 7 Wheaton, 284.
O'Neill v. *Central Leather Co.,* 94 Atl. Rep., 789.

Authorities.

In *Rose* v. *Himely*, one question was whether our Courts could examine the jurisdiction of a foreign prize tribunal in order to determine whether a sentence pronounced by the same was the sentence of a court of competent jurisdiction.

Chief Justice Marshall unhesitatingly held that this right existed and that it extended not only to the question whether the foreign court had general power to do what it professed to do, but also to the further question whether the situation of the particular thing on which the sentence was passed was such as to subject it to the jurisdiction of the court in question.

In the *Sabariego* case (*supra*) this Court, in determining the plaintiff's title to lands in Texas, examined into the validity of a confiscation for treason of the lands by the military commander of the Spanish Government under whose deed the defendant claimed title. And it held that the deed of the military commander was not sufficient to convey title because there was no competent proof that the treason of the former owner had been established by proper proceedings.

In the *O'Neill* case the question was whether the seizure of certain hides by General Villa during the revolution in Mexico had divested the title of the owner. The Court, it is true, referred to the rule here invoked that "the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory." But it did not finally apply that rule until it had elaborately examined into the status of General Villa and the forces he represented, the extent of the state of warfare and of the control exercised

by the Constitutionalists in the particular territory and the manner in which the seizure was carried out. It was only after he had reached the conclusion that all these prerequisites to the exercise of the right of seizure were present and that in the exercise of that right "the rules of war were complied with" by a fair and orderly levy of contributions properly distributing the burden among the taxpayers of the district (p. 792), that he declared the sale by General Villa valid and effective to convey title.

2. The certified question now under consideration does not present sufficient facts to enable this Court to determine whether the act of the Constitutionalist forces was such as to call for the application of the rule that our courts will not adjudicate upon the act of a foreign sovereign power or its agencies.

Argument.

The question calls for a determination as to the right of the District Court to inquire into an act alleged to have been done by an officer of a foreign government. As we have just seen, that right will be denied only if the act was of a certain quality, *i. e.*, where the official or body doing it was clothed with sufficient general authority and where the method of procedure employed was such as can be recognized as a just and fair method. We contend that the certificate does not state sufficient facts to enable this Court to determine whether the act here involved was of that quality.

The particular act referred to by the certified question is that of the "Constitutional forces in

revolution in Mexico" in seizing, condemning and selling "for war supplies" the bullion in suit. In order to determine the question whether that act was such an act of a foreign government or governmental officer as our courts would refuse to adjudicate upon, this Court must have before it facts which sufficiently describe the act. With regard to seizure in warfare by the forces of a foreign government, the rule of our courts is that such a seizure will not be questioned if it was had in accordance with the laws of civilized warfare.

As was said by Mr. Justice Swayze in *O'Neill* v. *Central Leather Company*, 94 Atlantic Rep., at 792:

> "The right to levy contributions is distinctly a conqueror's right and rests upon paramount force. * * * *Since the right exists under the laws of war, it must be exercised in accordance with those laws. It must not be confused with mere brigandage or looting.*"

Two methods of seizure are recognized by the rules of modern warfare. It may be had either as a result of the more orderly and fairer method of levying contributions (such as was adopted in the *O'Neill* case), or by summary confiscation. In order, however, to justify the adoption of the latter method,

> "The danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for" (*Mitchel* v. *Harmony*, 13 How., 115, at 134).
>
> "It is not sufficient to show that he (the officer) exercised an honest judgment, and took the property to promote the public ser-

> vice; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good" (*Ibid*, p. 135).

Such being the law, this Court must first be informed as to certain facts, if it is to determine whether or not the District Court properly entertained jurisdiction to pass upon the validity of the title to property attempted to be conveyed by the Constitutionalist forces. It should be informed as to the extent of the existence of warfare, whether in fact there was an actual state of warfare in the legal sense of that term. The certified question is silent upon this. It merely speaks of the Constitutionalist forces "in revolution." It should appear whether those forces were in sufficient control of the territory where the bullion was located to entitle them to be treated as the *de facto* government of that territory. Upon that point also the certified question is silent. It speaks of General Carranza merely as "*claiming* to be the Provisional President of the Republic of Mexico." Moreover, it does not state the method by which the seizure was effected, whether by a levy of contributions or by summary seizure. Nor does it state the conditions which prompted the seizure, so as to show whether or not there was a situation such as the officer might reasonably consider an urgent one demanding summary action on his part to supply the needs of his army.

As to all of these matters the certified question leaves this Court entirely in the dark. , The Court,

to answer the question, would have to resort to the transcript of the record and determine for itself the facts upon which it is to base its answer to the question, and that, as it has declared, it will not do in a proceeding of this nature.

2. The same result will follow even if the recital of the allegations in the pleadings as set forth in the certificate should be taken as a statement of established facts. For, while that recital contains the statement that the Constitutionalist General who made the seizure was in control and in undisputed possession of the City of Bermejillo where the bullion was seized, it does not, any more than the certified question, show the method pursued in making the seizure, or the conditions, if any, which warranted the same. All that this recital discloses upon this point is that the defendants allege that the bullion after being seized was sold and the *proceeds* used to purchase *other supplies* for the Constitutionalist army, of which that army was in need. This allegation, on the one hand, we submit, even if taken to be true, is not sufficient to enable this Court to find that the need was at all urgent so as to justify a summary seizure. On the other hand, taking it as an admission against the defendants, it shows on its face that there could not have been any urgent need, or any necessity at all, for the taking of the *bullion*. The bullion itself was not at all used by the army. If it needed anything, it was the *supplies purchased with the proceeds of the bullion*. The commander, however, instead of seizing the supplies which he is claimed to have needed, and which he would therefore have been justified in confiscating, deprived the plaintiff without compensation of its property, which he did not need, hence could not confiscate, and used the proceeds to pay the owner

of the supplies which he *did* need, hence should have confiscated it instead of the bullion. He thus, without any apparent justification whatever, took the property of one party, not to supply the needs of his army, but to compensate another party, whose property he might justly have taken but to whom he did not, for some reason unexplained, wish to cause any loss.

It will be observed that, judged by the allegations of the defendants' pleading, this case differs materially from *O'Neill* v. *Central Leather Company*. There, General Villa levied a general contribution on the entire district. The contribution was ratably apportioned among the taxpayers, and the hides in suit were taken from their owner, one of the taxpayers, because of his delinquency in paying his share of the contribution. Here, however, so far as the facts appear anywhere in the certificate, we are dealing with no such orderly proceeding, but solely with an isolated summary seizure of one man's property, not needed by the army, for the purpose of compensating another man whose property *is* needed for the use of the army. That such an act is entirely beyond the scope of a military commander's power is sufficiently indicated by such cases as *Mitchell* v. *Harmony*, 13 How., 115, 134; *Planter's Bank* v. *Union Bank*, 83 U. S., 483.

In the *Mitchell* case, as we have seen, the Court expressly stated that, to justify a seizure by a military commander,

> "the danger must be immediate and impending; or the necessity urgent for the public service, such as will admit of no delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for."

And in the *Planter's Bank* case, where General Banks, in command at New Orleans, during our Civil War, commanded the New Orleans banks to pay to the quartermaster of the army all moneys in their possession belonging to enemies of the United States, the Court held that such an order was not authorized and that it was not justified by the necessities of war. Upon the latter point the Court said:

> "Then (on August 17, 1863) the City of New Orleans was in quiet possession of the United States forces. It had been captured more than fifteen months before that time, and undisturbed possession was maintained ever after its capture. Hence the order was no attempt to seize property *'flagrante bello'* nor was it a seizure for the immediate use of the army. It was simply an attempt to confiscate property which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war."

If, therefore, the summary of the pleadings set forth in the certificate is for any reason to be relied upon by this Court as a statement of facts, it shows, *prima facie,* that the seizure was so clearly outside of the recognized rules of modern warfare, that our courts need not, even upon grounds of comity, hesitate to adjudicate the act void. They would not be bound to recognize such an act, any more than a judgment of a foreign court upon a matter clearly not within its jurisdiction. In that event, therefore, the first question will have to be answered in the affirmative, to the effect that the District Court had jurisdiction to deny the efficacy of an act, even of a military officer of a foreign government during a state of war, if that act could not by any possibility be deemed an act of legitimate warfare, dictated by what the officer might reasonably consider the necessities of war, but clearly was a mere wanton exercise of arbitrary power, apparently prompted by sheer favoritism.

Suggestions as to Question II.

The propositions stated under Question I are equally applicable here. The fact that the leader of the insurrectionary forces was subsequently recognized by our Government does not, in any sense, change the situation. We understand the law to be, that the acts of a *de facto* government, or its agents, even though not formally recognized by our Government, are on a level with the acts of a fully recognized *de jure* government. The question, therefore, is not whether or not the government was at any time recognized, but whether the act could at all be classed as a justifiable exercise of governmental power. If it was not such, then the subsequent recognition of the *de facto* or revolutionary government cannot clothe it with that character, and our courts are just as free, then, to criticize it as if that government had never been recognized. For, as appears from the *Sabariego* case, our courts will not hesitate to declare null and void an act of arbitrary confiscation, even by a regularly constituted government.

Here again, therefore, the facts set forth in the certified question taken by itself, are not sufficient to enable this Court to answer the question. Or, if the allegations of the pleadings, as set forth in the body of the certificate, are to be taken as statements of established facts, the District Court was dealing with an act of arbitrary confiscation, not

even remotely justified by the necessities of war, hence one which it could have rightfully declared invalid, even if the act had, in the first instance, been committed by an officer of a recognized government.

Suggestions as to Question III.

1. Here again the facts set forth in the certified question are insufficient to make it possible for the Court to answer the same, unless the allegations of the pleadings are to be taken as proved, in which event the question must be answered in favor of the plaintiff, *i. e.*, in the negative.

Argument.

If the facts set forth in the first two questions and in the certificate are not sufficient to determine the preliminary question upon which the jurisdiction of the District Court depended, viz., as to the general authority of the Constitutionalist officer to make seizures and as to the method employed by him in making the seizure in question, it follows *a fortiori* that the facts before this Court do not enable it to determine the third question, whether that act was sufficient to divest the plaintiff's title; for that requires a complete knowledge of the character of the officer's act. Was he in sufficient control of the territory in question and backed by a sufficient paramount force to constitute him the *de facto* governor of the district? If so, did he make the seizure in the course of a fair and orderly levy of contributions on all the taxpayers of the district, or did he arbitrarily and without any necessity seize property of the plaintiff only? Or if he took the property summarily, did he take it for any urgent necessity? None of these questions can possibly be answered by this Court, as they are all questions of fact. Nor are they matters as to which this Court can possibly take judicial cognizance. As to some of them, we do not even know whether any evidence was offered at the trial. Indeed, the summary of the pleadings contained in the certificate would indicate that some of them may not have been raised at all upon the trial. Recourse to the transcript is forbidden by the decision of this Court. How then are those questions to be decided? How can they even be argued upon the present record?

2. What has just been said is equally true even if all the allegations of the pleadings as they are set forth in the certificate should be treated here as established facts. Even then justification for the seizure would not appear, not even *prima facie*. On the contrary, as we have seen, it would appear from the defendants' allegations that the act was not, in any sense, justified by the law of warfare; that it was a confiscation, not of property for the needs of the army, but merely for the purpose of compensating, with its proceeds, other persons whose property *was* needed for the army and was properly subject to seizure, hence an arbitrary exercise of power. Such an act clearly cannot be given any effect in law, and the purchaser who took it from the officer in question acquired no more title than if he had bought stolen property.

3. The Hague Convention, to which both the United States and Mexico were signatories, expressly provides in Section III of the "Regulations

Respecting the Laws and Customs of War on Land" that "private property cannot be confiscated." And it limits the military authorities in control to the method of general requisition in raising necessaries for the army. In this aspect also, therefore, the act in question, as it appears from the certificate, must be considered an unlawful interference with private property which cannot give title to the defendants.

The Appellants' Authorities.

The authorities cited by the appellants are not in any sense in conflict with the arguments here presented either upon the question as to the necessary prerequisites to be established before the Court can determine whether the case is one in which it should refuse to adjudicate upon the act of the foreign officer, or upon the question whether *a title to property* is valid which is based on a seizure by an officer of a foreign power, regardless of the circumstances and manner in which the seizure was effected.

Underhill v. *Hernandez,* 65 Fed. Rep., 577, was a case where an officer of the Venezuelan insurgents was sought to be held *personally* liable in damages, not for a seizure of property, but for refusal to let the plaintiff depart from the City of Bolivar, which the defendant had just captured. All the details of the act were before the Court upon an appeal on the entire record. It appeared that the purpose of the restraint exercised over the plaintiff was to coerce him to operate his waterworks for the benefit of the community and of the revolutionary forces, and the Court held that the

act was not one the validity of which it would attempt to pass upon, quite evidently because it considered the acts complained of, and thus explained, as sufficiently within the general scope of the power of a military commander. There can be no comparison between such an act and the arbitrary seizure of the property of an individual not in itself necessary for the support or protection of the army, as would appear to have been the case here, if indeed we are at all informed as to the nature of the act.

The case of *L'Invincible,* 14 U. S., 238, cited by the appellants, really supports our contention that our courts will not renounce jurisdiction until they are satisfied that the prerequisites are present upon which alone the act of the foreign power can be justified. The Court there said (p. 258):

> "That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession; to wit, those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture."

Schooner Exchange v. *McFadden,* 11 U. S., 117, merely holds that a war vessel of a foreign nation at peace with this country is exempt from the jurisdiction of this country while in our ports. It thus has no bearing on this case.

Ford v. *Surget,* 97 U. S., 594, was a case where the plaintiff sought to hold in damages a person who, by order of the Confederate authorities, had destroyed cotton. Here, like in the *Hernandez* case, the ruling merely was that the defendant was not personally liable for his act. No question of the transfer of title to property was involved.

Dow v. *Johnson,* 100 U. S., 158, fully recognizes the rule invoked by us that before private property can be seized it must appear to be necessary for the support or convenient for the use of the army. It does not by any means announce the renunciation of all jurisdiction of our courts to inquire whether a given act was at all a legitimate exercise of war power. Moreover, it, again, is a case not involving questions of title, but merely the question of the officer's personal liability for an act apparently done in good faith.

Lamar v. *Browne,* 92 U. S., 187, was a case of the confiscation of cotton in our Civil War, not on any ground of the necessities of the army, but because in that war cotton was universally considered and treated as contraband and the subject of capture *under any and all circumstances.* The case cannot, therefore, bear upon the question whether a right of confiscation which is granted conditionally only was properly exercised.

American Banana Co. v. *United Fruit Co.,* 166 Fed. Rep., 261, while containing rather broad language which might be deemed to support some of appellants' contentions, again did not involve questions of title. It was an action for trade damages against the defendant for having instigated the Costa Rican Government to take possession of the

plaintiff's plantation. It does not, however, appear even to have been alleged or suggested that the acts of the Costa Rican Government were unlawful in any possible aspect. Naturally the defendant could not, in those circumstances, be held liable.

Conclusion.

If our contentions are sustained, this Court, it is respectfully submitted, should *either* dismiss the case for want of a proper statement of facts in the certificate, *or* answer the questions in favor of the plaintiff; that is to say—

I. Affirm the jurisdiction of the District Court to adjudicate upon the act of the Constitutionalist forces, palpably committed contrary to the laws of war;

II. Deny that such an act can be legalized by the subsequent recognition of the insurgent government;

III. Declare that the defendants cannot derive any title through the palpably unlawful act thus committed.

Respectfully submitted,

JULIUS GOLDMAN,
JULIAN B. BEATY,
Of Counsel for Appellee,
The American Metal Co., Ltd.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

NO. 119.

EDUARDO RICAUD, L. C. BARLOW AND CHARLES HICKERSON, *Plaintiffs in Error*

vs.

THE AMERICAN METAL COMPANY, LIMITED.

BRIEF OF APPELLEE.

[redacted]Y,
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INDEX OF AUTHORITIES, CITED.

	Page
Mitchel vs. Harmony, 15 Howard, 113; 14 Law Ed. U. S., 75	4
Fifth Am. Constitution of the U. S.	4
Sallards vs. Zones, 68 Ky., 90	4
Ferguson vs. Lear, 68 Ky., 689	4
Saratoga vs. 438 Bales of Cotton, Fed. Cases No. 12356	5
Mitchel vs. Harmony, 15 Howard, 113	6
Planters Bank vs. Union Bank, 21 Law Ed., 473	6
U. S. vs. David G. Cook, 17 Law Ed. 866	6
Ferguson vs. Lear, 68 Ky., 689	6
Sallards vs. Zones, 68 Ky., 90	6
Wheaton's International Law	6
Hallock's International Law	6
Philippine Sugar Est. Dev. Co. vs. U. S., 40 Court of Claims, 833	7

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vs.

THE AMERICAN METAL COMPANY, LIMITED.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The statement of the case by the United States Circuit Court of Appeals is here adopted.

This case being before the court on certified questions propounded by the United States Circuit Court of Appeals, much of the matter included in the brief filed in the lower court may be eliminated, the facts being stated in the questions certified.

The questions propounded cover the facts in the case and we submit the following propositions and counter-propositions.

PROPOSITIONS.

First:

The complainant's (American Metal Company, Limited) bill being filed to determine the ownership and title to property of an American citizen, and said property together with the parties being within the actual jurisdiction of the court, the court would have jurisdiction and the right to adjudicate the title to said property.

Second:

The title to personal property can only be divested by due process of law, and where said property together with the parties are within the jurisdiction of the court, and the showing being made that said property belonged to complainant, appellant would be required to show that said title to said property had been legally divested by some law of the country where taken, and our courts are always open to its citizens for the recovery of their movable property, and the property being in the jurisdiction of the court, the court would have a right to inquire where it came from, to whom it belonged, and how and by what right it came to be in the possession of appellants.

Third:

Appellants having appeared, having plead to the merits and having plead as a defense that said property was taken as a war measure for the purpose of providing troops with clothing, munitions of war, etc., and that said bullion was sold to defendant Ricaud and the money used for the purchase of arms and supplies for the troops, and said bullion and said parties being before

the court and within the jurisdiction of the court, and there being evidence introduced tending to establish the facts as claimed by each party, and the court having heard all the evidence and all the facts, and having found against the defendants, judgment was properly rendered for appellee.

Fourth:

Appellee having alleged that it was the owner of the bullion sued for, that it was taken from it without its consent and without being paid for, and defendants having appeared and plead that said bullion was taken and seized as a war measure and having submitted themselves to the jurisdiction of the court and on the hearing there was evidence tending to establish the facts as claimed by each party, the court having all the parties and witnesses before it, and the evidence being conflicting, found against the defendants on their plea and awarded the bullion to appellee.

Sixth:

Defendants having plead that the bullion was taken as a war measure and the bullion and the parties being within the jurisdiction of the court, the court would have the right to inquire as to whether or not the bullion was taken in accordance with the rules of war, and whether or not the necessity, if any, authorizing its taking, existed; and the court having heard evidence on this issue and found against appellants, they would be bound.

STATEMENT.

The Circuit Court in their certified questions stated that the American Metal Company, Limited was the

owner of the bullion and that the same was forcibly taken from its possession and without its consent and prayed for the recovery of said bullion or for its value, and alleged that same was in the custody of the Collector of Customs at El Paso, Texas. Defendant Barlow plead that he was the owner of the bullion and purchased same from Ricaud, who purchased same for General Pereyra; that a state of war existed in Mexico and said bullion was taken by Pereya, as General, as a war measure, for the purpose of providing his troops with clothing, munitions of war, food, etc., that the taking and receipt of said bullion was made by the military officers of the defacto Government of which Venustiano Carranza was Provisional President. The Circuit Court finds and certifies that on the hearing in the trial court there was evidence tending to establish the facts as claimed by each party. The court having heard the evidence found against appellants on their plea.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
14 Law Ed., U. S., 75.

PROPOSITION.

No person's property shall be taken, damaged or destroyed or applied to public use without ample compensation being paid therefor.

AUTHORITIES.

Fifth Am. Constitution of the U. S.
Mitchel vs. Harmony, 15 Howard, 113;
Sallards vs. Zones, 68 Ky., 90;
Ferguson vs. Lear, 68 Ky., 689;

Saratoga vs. 438 Bales of Cotton, Fed. Cases No. 12356;

PROPOSITION.

To authorize the seizure of private property when needed in the course of military operations, the necessity must be urgent and absolutely necessary, and unless the necessity is urgent, and it is not necessary in the course of actual military operations, a seizure so made would be void.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
Planters Bank vs. Union Bank, 21 Law Ed., 473;
Also cases cited above.

PROPOSITION.

Where the evidence shows that a faction is in the undisputed control and possession of a certain territory and that war is not flagrant in said territory and no battles are being fought, the right and necessity to seize property for military purposes would not exist and a seizure so made would be void.

PROPOSITION.

Where war had been carried on and existed at a prior time in a certain territory and said territory had been conquered and was in the undisputed possession of the faction under which the seizure was made at the time, the necessity authorizing the seizure would not exist and the seizure so made would be void.

PROPOSITION.

Where a territory is under the control and in the un-

disputed possession of military authorities and no apparent necessity exists for seizing personal property, a seizure so made would be void.

STATEMENT.

The certificate states that a revolution was in progress in Mexico headed by Venustiano Carranza, and that the Constitutionalist forces were in control of a large portion of the Republic of Mexico, including the cities of Mapimi, Bermejillo and Parral, and that said General Pereyra was the military commander in control and in undisputed possession of said district in his official capacity as General in said army; that said bullion was taken from the Penoles Mining Company at Bermejillo and the facts certified fail to show that there was any war being waged in this territory or any battles being fought, or that war was flagrant at the time of seizure, and the right to seize said bullion would not exist.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
Planters Bank vs. Union Bank, 21 Law Ed., 473;
U. S. vs. David G. Cook, 17 Law Ed. 866;
Ferguson vs. Lear, 68 Ky., 689;
Sallards vs. Zones, 68 Ky., 90;
Wheaton's International Law;
Hallock's International Law.

PROPOSITION.

Where a party does business in a territory which is under the control and in the undisputed possession of a certain faction, any seizure would be void.

STATEMENT.

The revolutionists being in undisputed posession of the territory of Bermejillo and surrounding territory, when and where this bullion was taken, the necessity authorizing its seizure would not exist.

AUTHORITIES.

Philippine Sugar Est. Dev. Co. vs. U. S., 40 Court of Claims, 833;

Also see authorities cited under above propositions.

ARGUMENT

The certificate of facts certified in this case shows that the property was purchased by the American Metal Company from Penoles Mining Company, a corporation doing business in Mexico, and which had been doing business a long time prior to the time the bullion was seized; that said bullion was taken without any legal process, authority or any adjudication under any rule, law or regulation existing in the foreign country in which it was done, and it was subsequently brought to the United States and entered at the port of El Paso, Texas and proceedings were promptly instituted by complainant for its recovery, defendants pleading and attempting to justify their possession on the ground that same was taken by the military forces during the progress of the revolution going on in Mexico at the time the property was taken; that the same was taken as a military necessity, the evidence showing that at the time the property was taken and at the place where it was taken every-

thing was peaceable, and the territory was in the undisputed control and possession of the faction by which same was taken. The certificate does not show that any battles were being fought or that war was flagrant. The certificate shows that evidence was introduced in the trial by the lower court by both parties supporting their respective claims, and that the court had all the parties and witnesses before it, and by awarding the bullion to complainant necessarily found against the defendants on their defense.

The court must bear in mind that this action, as originally instituted, was against the bullion and was not against any officer or agent of the Republic of Mexico or against any government. The complainant was not seeking redress affirmatively for a breach of military or civil acts of the Republic of Mexico in the courts of the United Statse and therefore the only question in the case is, "Do the defendants show title to the property in controversy?" And this the defendants have a right to do in any country and in any court, and the plaintiff has a right to resist it in any court of any country. The defendants alleging that at one time the bullion did belong to plaintiff and those under whom plaintiff claims, but that the title was divested out of it on account of being seized as a war measure, the burden rested on defendants to show that the necessity authorizing its taking as a war measure existed, in in fact it was so taken. And the defendants below had to show that it was taken under some law, rule or regulation existing in the territory where it was taken, and that it was taken as alleged by them. Our court would have a perfect right to inquire into these facts, and having inquired into the same.

and having heard the evidence and found against defendants, they would be bound.

Furthermore, admitting that war had been waged and was flagrant in a certain territory at a prior time to that of the seizure and the territory having come into, and under the undisputed possession and control of the party making the seizure; in other words, having resumed their normal status and conditions, the necessity authorizing the seizure would not exist, and the burden would be to show under the laws of Mexico such necessity.

In this case, the property for which the suit was filed is in the jurisdiction of the court, the case not being a personal action against any military officer, but we have the subject matter, that is the bullion, and the parties before us, and having shown that the American Metal Company Limited was the owner of the bullion, and that it was taken from them without their consent, the burden rested on the defendants to show by some known rule of law that this title was divested. And we respectfully submit that this Honorable Court should answer the questions by upholding the jurisdiction of our courts to inquire into these matters, and also find that the title of an American citizen to property could not be divested in the manner in which it is attempted to be done in this case.

Respectfully submitted,

[redacted],

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